

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the First Amended)
Accusation And Petition to Revoke)
Probation Against:)
)
Michael D. Berger, M.D.)
Physician's and Surgeon's)
Certificate No. G 21264)
)
Respondent.)
)
_____)

Case No. D1-2005-170995

**DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by Michael D. Berger, M.D., and the time for action having expired at 5 p.m. on May 26, 2014, the petition is deemed denied by operation of law.

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

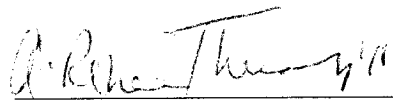
In the Matter of the First Amended Accusation)	
And Petition to Revoke Probation Against)	MBC No. D1-2005-170995
)	
)	
Michael D. Berger, M.D.)	
)	
Physician's & Surgeon's)	ORDER GRANTING STAY
Certificate No. G 21264)	
)	(Gov't Code Section 11521)
)	
_____ Respondent)	

Michael D. Berger, M.D., has filed a Petition for Reconsideration of the Decision in this matter with an effective date of May 16, 2014.

Execution is stayed until May 26, 2014.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: May 9, 2014



A. Renee Threadgill
Chief of Enforcement
Medical Board of California

Barbara Yaroslavsky, Chair
Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation and Petition to Revoke Probation
Against:

MICHAEL D. BERGER, M.D.

Physician's and Surgeon's
Certificate No. G 21264

Respondent.

Case No. D1-2005-170995

OAH No. 2013040783

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on February 4, 2014.

Tessa L. Heunis, Deputy Attorney General, represented Complainant Linda K. Whitney, Executive Director of the Medical Board of California, Department of Consumer Affairs.

Respondent was present and represented himself.

The matter was submitted on February 4, 2014.

FACTUAL FINDINGS

1. Linda K. Whitney (Complainant) filed First Amended Accusation and Petition to Revoke Probation, Case No. D1-2005-170995, dated February 22, 2013, in her official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On August 27, 1971, the Board issued Physician's and Surgeon's Certificate Number G 21264 (Physician's and Surgeon's Certificate) to Michael D. Berger, M.D. (Respondent). At all times relevant herein, said Physician's and Surgeon's Certificate was in full force and effect and will expire on March 31, 2014, unless renewed or disciplined.

3. In a prior disciplinary action, entitled *In the Matter of the Accusation Against Michael Dean Berger, M.D.*, Case No. 10-2005-170995, the Board issued a decision and order, effective May 19, 2008; Respondent's Physician's and Surgeon's Certificate was revoked; the revocation was stayed; Respondent's Physician's and Surgeon's Certificate was placed on probation for a period of seven years with certain terms and conditions. Respondent is scheduled to complete probation in May 2015.

4. In this First Amended Accusation and Petition to Revoke Probation, Complainant seeks to revoke Respondent's Physician's and Surgeon's Certificate, alleging:

- He failed to comply the terms and conditions of probation; (1) he failed to make daily contact with First Lab and failed to report to a FirstLab approved testing site for random biological fluid testing; (2) he failed to pay probation monitoring costs; (3) he failed to submit quarterly reports in a timely manner; and (4) he failed to comply with an order of abatement issued by the Medical Board.
- He failed to comply with an Order of Abatement to make full payment of his probation monitoring costs to the Board.
- He committed acts of dishonesty or corruption in that he submitted quarterly reports, under penalty of perjury, attesting that he had complied with the terms and conditions of probation; in truth and in fact, he had not complied, and he knew that he had not complied.

Respondent does not dispute the facts alleged by Complainant but seeks to retain his Physician's and Surgeon's Certificate; he explained the reasons for the failure to comply and testified that if allowed to retain his Physician's and Surgeon's Certificate, he will comply in the future.

5. Respondent filed a Petition for Early Termination of Probation. At the time of hearing on the petition, Petitioner had approximately three years and 10 months of probation remaining. Effective October 7, 2011, the Board denied Respondent's petition based on his violation of probation for: (1) testing positive for marijuana on two occasions (while on probation) and (2) failing to pay probation monitoring costs for 2009.

Failure to Comply with Required Biological Fluid Testing

6. Condition 3 of Respondent's terms and conditions of probation provided:

Biological Fluid Testing Respondent shall submit to biological fluid testing, at respondent's expense, upon the request of the Board or its designee. A certified copy of any laboratory test results may be received in evidence in any

proceeding between the Board and respondent. Failure to submit to, or failure to complete the required biological fluid testing, is a violation of probation.

7. On September 27, 2010, Respondent entered into an agreement with First Hospital Laboratories, Inc., doing business as FirstLab (First Lab).

According to the terms of the agreement, Respondent had a disciplinary obligation to submit to random drug and/or alcohol testing by the Medical Board and that the Board had entered into an agreement with FirstLab to provide drug testing services for the Board. The agreement further described the procedures that Respondent was required to follow, including communicating with FirstLab (by calling-in or logging in), random testing and payment, as well as the consequences for failing to comply with the foregoing.

Pursuant to Condition 3 of Respondent's probation and the agreement entered into between Respondent and First Lab, Respondent was required to submit to random drug and/or alcohol tests administered by FirstLab. In order to ascertain whether he had been selected for testing on a particular day, Respondent was required to make daily contact with FirstLab, between 12:00 a.m. and 5:00 p.m. If selected for testing, Respondent was required to report to a FirstLab approved testing site and be tested on that same day.

Regarding payment, Respondent was required to submit a credit or debit card to FirstLab; FirstLab would bill the credit card once a month for all tests that were reported to FirstLab during the previous month on the 23rd of each month; if the 23rd fell on a weekend, processing would be completed the following Monday. If the credit card was declined, FirstLab's Finance Department would suspend call-in/log-in privileges. Respondent would be notified via the Test Notification System and would have the ability to clear up his balance with FirstLab at that time. After his account had been paid in full, he would be re-activated and notified whether or not he had been selected for testing that day.

8. On multiple dates in 2011, 2012 and 2013, respectively, Respondent failed to make daily contact with FirstLab.

During 2011, Respondent failed to make daily contact for at least 12 days. In addition, by way of aggravation, during 2011, Respondent's biological test was positive on December 19, 2011, and December 30, 2011, two months after his Petition for Early Termination of Probation was denied for testing positive on November 25, 2008, and December 5, 2008.

During 2012, Respondent failed to make daily contact with FirstLab on more than 80 days. On some of the days, he was not allowed to call-in/login because his credit card had been declined.

During 2013, Respondent failed to make daily contact with FirstLab on more than 15 days.

On May 3, 2012, July 30, 2012, August 3, 2012 and December 27, 2012, FirstLab selected Respondent for testing; Respondent failed to report to a FirstLab testing site for testing.

9. Respondent's probation is subject to revocation because he failed to comply with Condition 3 of the terms and conditions of his probation.

Failure to Pay Probation Monitoring Costs

10. Condition No. 20 of Respondent's terms and conditions of probation provided:

Probation Monitoring Costs Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

11. On October 3, 2011, the Board advised Respondent that his annual probation costs for 2011 were \$3,999; this amount was due and payable no later than January 31, 2012.¹

12. Respondent failed to pay the Board its probation monitoring costs for 2011 by January 31, 2012 and for 2012 by January 31, 2013. As of the day of hearing, Respondent owed probation monitoring costs of \$7,677.

13. Respondent's probation is subject to revocation because he failed to comply with Condition 20 of the terms and conditions of his probation in Case No. 10-2005-170995.

Failure to Submit Quarterly Declarations as Required

14. Condition 12 of the terms and conditions of Respondent's probation provided as follows.

Quarterly Declarations Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all terms and conditions of probation. Respondent shall submit quarterly declarations no later than 10 calendar days after the end of the preceding quarter.

15. Respondent's quarterly declaration for the second quarter of 2010 was due to the Board by July 10, 2010 but was received by the Board on July 19, 2010.

¹ The Medical Board notified Respondent again on January 31 and February 28, 2012 that his probation monitoring costs of \$3,999 were due on January 31, 2012.

16. Respondent's quarterly declaration for the third quarter of 2010 was due to the Board by October 10, 2010 but was received by the Board on October 29, 2010

17. Respondent's quarterly declaration for the fourth quarter of 2010 was due to the Board by January 10, 2011 but was received by the Board on February 9, 2011.

18. Respondent's quarterly declaration for the second quarter of 2011 was due to the Board by July 10, 2011 but was received by the Board on August 11, 2011.

19. Respondent's quarterly declaration for the third quarter of 2011 was due to the Board by October 10, 2011 but was received by the Board on October 26, 2011.

20. Respondent's quarterly declaration for the fourth quarter of 2011 was due to the Board by January 10, 2012 but was received by the Board on February 14, 2012.

21. Respondent's quarterly declaration for the first quarter of 2012 was due to the Board on April 10, 2012 but was received by the Board on May 22, 2012.

22. Respondent's probation is subject to revocation because he failed to comply with Condition 12 of the terms and conditions of probation.

Failure to Comply with Order of Abatement

23. On May 11, 2012, the Board issued administrative Citation Order No. 25-2012-222990 (Citation Order) for violation of Condition 20. The Citation Order contained an order of abatement requiring Respondent to make full payment of his probation monitoring costs for 2011 calendar year within 30 days from receipt of the citation (Order of Abatement). The Citation Order contained the following admonition: "FAILURE TO COMPLY WITH THIS CITATION ORDER WILL RESULT IN DISCIPLINARY ACTION AGAINST YOUR LICENSE." (Emphasis in original.)

24. The Citation Order was mailed to Respondent by certified mail, return receipt requested. The return receipt was subsequently returned to the Medical Board, signed "MICHAEL BERGER" and dated May 29, 2012.

25. Respondent neither contested the Order of Abatement nor appealed the Citation Order.

26. Respondent did not comply with Order of Abatement; he did not pay his probation monitoring costs for the 2011 calendar year within 30 days from receipt of the Order of Abatement.

Committed Acts of Dishonesty

27. The quarterly reports submitted by Respondent pursuant to Condition No. 12 in Case No. 10-2005-170995 are signed under the following admonition:

I hereby submit this Quarterly Declaration as required by the Medical Board of California and its Order of probation thereof and declare under penalty of perjury under the laws of the State of California that I have read the foregoing declaration and any attachments in their entirety and know their contents and that all statements made are true in every respect and I understand and acknowledge that any misstatements, misrepresentations, or omissions of material fact may be cause for further disciplinary action.

28. In his quarterly declaration for the third quarter of 2012, which Respondent signed on October 1, 2012, Respondent was asked:

Are you required to undergo biological fluid testing? If yes, when were you last tested and what is the frequency of testing?"

Respondent answered: "Monthly last November 2012."

29. In his quarterly declarations (2010, 2011 and 2012), Respondent falsely declared, under penalty of perjury, that he had complied with each term and condition of probation during the preceding quarter; in truth and in fact, Respondent had not complied with one or more terms of his probation.

Evidence of Explanation

30. Respondent did not dispute his violations but testified, in summary, that he was "broke and depressed" and did not "dot 'I's' or cross 'T's'."

He testified that being on probation has not been easy; he has suffered significant financial and personal repercussions; he lost his home to foreclosure; he lost his wife and family; he has emptied his saving and retirement accounts and has no money; he has been severely depressed.

Regarding the payment of probation monitoring costs, Respondent testified that he has made every effort to divert income beyond living expenses to pay the probation monitoring costs; he moved into an apartment and now lives in a room in a motor home; due to his reduced living expenses, he anticipates that he will pay outstanding probation monitoring costs by the end of 2014; he "is not paperwork oriented but does the best he can."

Regarding failing to call in/log in, appearing for testing, and keeping his payments current in order to comply with Condition 3 (biological fluid testing), Respondent testified that he was fighting to avoid foreclosure from February until the beginning of July 2012,

when his home was foreclosed; then he moved into an apartment that did not have internet or telephone due to the cost; he was depressed during this time. In addition, Respondent testified that he did not realize that he missed so many call-ins/logins until his probation monitor told him.

Respondent testified specifically that his account was suspended on August 3, 2012, because he had no funds in his checking account, and reactivated on August 4, 2012 when his social security check was deposited; between August 5, 2012 and September 30, 2012, he had no internet or telephone service; he was severely depressed and had no other excuse; the dates that he did not miss calls, he was at work or another location and was able to access the internet; between October 6, 2012 through October 29, 2012, he was depressed; between November 23, 2012 and December 1, 2012, his bank account was empty; his account with FirstLab was reactivated when his social security check was deposited; between December 24 and 28, 2012, he was away for Christmas and was not aware of the procedure that he should have followed, despite the terms described in the agreement between Respondent and FirstLab.

Regarding failing to file his quarterly declarations in a timely manner, Respondent testified: "he does not dot 'i's' or cross 't's'."

Respondent testified that his failure to comply with Conditions 3, 12 and 20 should not result in the revocation of his license; none of his biological fluid tests have been positive; he does not use drugs; he is a good physician who provides good medical care; he has a lot to offer California, the medical community, the patient community and the public. He realizes that he has not complied with the terms and conditions of probation and that he could have done better. However, he asked for leniency; he testified that, if given an opportunity, he would comply.

31. During his testimony, Respondent described innovations that he developed that were implemented by hospitals in the field of emergency medicine more than 30 years ago.

In addition, he testified regarding his work developing an "immuno therapy" medication through research he conducted while working at Immunovative Therapies, Ltd. The "immuno therapy" is designed to stimulate and control the direction of a person's immune response to cancer without toxicity. According to Respondent, when the clinical trial results are published, it will be a major breakthrough in cancer treatment, especially in patients with stage IV cancer.

In addition, he testified regarding an HIV protocol that he "put together." According to Respondent it can improve the status of HIV and AIDS patients.

Rebuttal Evidence

32. Complainant established that, on the date of the hearing, Respondent owed probation monitoring costs in the amount of \$7,677.00. According to his Bank of America statements for June 28, 2012 through July 27, 2012, and for July 28, 2012 through August 29, 2012, Respondent had adequate funds to pay FirstLab; he paid for internet and cellular telephone service.

33. By letter, dated September 26, 2011, the Food and Drug Administration (FDA) sent Respondent a letter entitled "Notice of Initiation of Disqualification Proceedings and Opportunity to Explain;" in this letter, the FDA notified Respondent of deficiencies in the clinical studies performed while he was the clinical investigator of the studies. Respondent did not respond to this letter. During the hearing, Respondent explained what occurred.

LEGAL CONCLUSIONS

1. Business and Professions Code (Code) section 2227 states:
 - (a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may in accordance with the provisions of this chapter:
 - (1) Have his or her license revoked upon order of the board.
 - (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
 - (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.
 - (4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.
 - (5) Have any other action taken relation to the discipline as part of an order of probation, as the board or an administrative law judge may deem proper.
 - ...
2. Section 2234 of the Code states, in pertinent part:

The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

- (a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

[¶]...[¶]

- (e) The commission of any act involving dishonest or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

- (f) Any action or conduct which would have warranted the denial of a certificate.

...

3. Section 125.9 of the Code states, in pertinent part:

(a) Except with respect to persons regulated under Chapter 11 (commencing with Section 7500), and Chapter 11.6 (commencing with Section 7590) of Division 3, any board, bureau, or commission within the department, ... may establish, by regulation, a system for the issuance to a licensee of a citation which may contain any order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto.

(b) The system shall contain the following provisions:

- (1) Citations shall be in writing and shall describe with particularity the nature of the violation, including specific reference to the provision of law determined to have been violated.
- (2) Whenever appropriate, the citation shall contain an order of abatement fixing a reasonable time for abatement of the violation.
- (3) In no event shall the administrative fine assessed by the board, bureau, or commission exceed five thousand dollars (\$5,000) for each inspection or each investigation made with respect to the violation, or five thousand dollars (\$5,000) for each violation or count if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare. In assessing a fine, the

board, bureau, or commission shall give due consideration to the appropriateness of the amount of the fine with respect to factors such as the gravity of the violation, the good faith of the licensee, and the history of previous violations.

(4) A citation or fine assessment issued pursuant to a citation shall inform the licensee that if he or she desires a hearing to contest the finding of a violation, that hearing shall be requested by written notice to the board, bureau, or commission within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(5) Failure of a licensee to pay a fine within 30 days of the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board, bureau, or commission

...

4. California Code of Regulations, title 16, section 1364.12, Title 16 states:

(a) If a cited person who has been issued an order of abatement is unable to complete the correction within the time set forth in the citation because of conditions beyond his or her control after the exercise of reasonable diligence, the person cited may request an extension of time in which to complete the correction from the board official who issued the citation. Such a request shall be in writing and shall be made within the time set for abatement.

(b) When an order of abatement is not contested or if the order is appealed and the person cited does not prevail, failure to abate the violation charged within the time allowed shall constitute a violation and a failure to comply with the order of abatement. An order of abatement shall either be personally served or mailed by certified mail, return receipt requested. The time allowed for the abatement of the violation shall begin when the order of abatement is final and has been served or received. Such failure may result in disciplinary action being taken by the Division of Medical Quality or other appropriate judicial relief being taken against the person cited.

5. Pursuant to the Board's Decision and Order in Case No. 10-2005-170995, the Board placed Respondent on seven years probation on terms and conditions that included, among other things, that he submit to biological fluid testing (Condition 3), that he pay the costs of probation monitoring (Condition 20) and that he file quarterly reports in a timely manner (Condition 12). Respondent did not comply with these conditions.

On June 22, 2010, the Board issued Respondent a citation for failing to pay probation monitoring costs for 2009, in violation of a probationary term, and ordered Respondent to provide full payment of the 2009 probation and monitoring costs within 30 days. Respondent did not appeal, did not request additional time to pay and did not pay the probation monitoring costs in a timely manner.

When he filed quarterly reports in 2010, 2011 and 2013, Respondent committed acts of dishonesty in that he declared under penalty of perjury that he was in compliance with the terms and conditions of probation. In truth and in fact, Respondent was not in compliance because he was in violation of Conditions 3, 20 and 12.

6. Pursuant to Sections 2227 and 125.9, subdivision (b) of the Code and California Code of Regulations, title 16, section 1364.10, cause exists to discipline Respondent in that he violated the terms and conditions of probation and the order of abatement.

7. Pursuant to Sections 2227 and 2234, as defined by Section 2234, subdivision (e) of the Code, cause exists to discipline Respondent in that he committed acts of dishonesty.

8. Considering Respondent's violations, the question is whether he should be allowed to remain on probation (potentially with an extension of probation) or whether revocation of his license is more appropriate. He should be allowed to remain on probation if his deficiencies can be corrected. However, if rehabilitation is inconsistent with public protection, public protection prevails.

The Board has licensed Respondent for more than 30 years. He has been on probation for six years. For at least four years, he has been in violation of the terms of probation. Based on the charges in the First Amended Accusation and Petition to Revoke Probation (and admitted by Respondent), the terms and conditions of probation include random biological fluid testing. In November and December 2011, he tested positive for prohibited substances. The last time he tested positive was more than two years ago. However, for extended periods of time, he was not tested, either because he did not call-in/login or because his credit card was declined. Since 2010 he has not paid the probation monitoring costs in a timely manner, and his quarterly reports have been late. In response, he said that he was depressed, broke and is not good with paperwork.

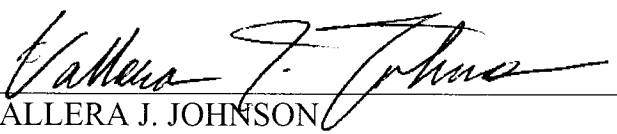
It is reasonable that, while on probation, Respondent may have difficulty finding employment, have difficulty financially and have difficulty paying his probation monitoring costs. However, there is no evidence that he notified the Board of his depression or requested additional time to pay the abatement order or requested additional time to pay the probation monitoring costs. The costs to comply with call-in/login to FirstLab and to submit his quarterly reports in a timely manner are minimal. Even after the filing of the Accusation, Respondent continued to violate the terms and conditions of his probation. As such, considering the evidence in totality, insufficient evidence was offered to establish that if

granted an additional opportunity to do so, even if probation is extended, that Respondent will comply. As such, it would be contrary to the public interest to allow Respondent to retain his Physician's and Surgeon's Certificate at this time.

ORDER

Physician's and Surgeon's Certificate Number G 21264, issued to Michael D. Berger, M.D. is revoked.

DATED: March 5, 2014


VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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8 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO February 22 2013
BY H. Park ANALYST

10 BEFORE THE
11 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
12 STATE OF CALIFORNIA

13 In the Matter of the First Amended Accusation
and Petition to Revoke Probation Against:

Case No. D1-2005-170995

14 **MICHAEL D. BERGER, M.D.**
15 **29458 Miller Road**
16 **Valley Center, CA 92082**

**FIRST AMENDED ACCUSATION AND
PETITION TO REVOKE PROBATION**

17 **Physician's and Surgeon's
Certificate No. G 21264**

18 Respondent.

19
20 Complainant alleges:

21 PARTIES

22 1. Linda K. Whitney (Complainant) brings this First Amended Accusation and Petition
23 to Revoke Probation solely in her official capacity as the Executive Director of the Medical Board
24 of California, Department of Consumer Affairs (Board).

25 2. On or about August 27, 1971, the Medical Board of California issued Physician's and
26 Surgeon's Certificate Number G 21264 to Michael D. Berger, M.D. (Respondent). The
27 Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the
28 charges brought herein and will expire on March 31, 2014, unless renewed.

1 **PRIOR DISCIPLINE**

2 3. In a prior disciplinary action entitled *In the Matter of the Accusation Against Michael*
3 *Dean Berger, M.D.*, Case No. 10-2005-170995, the Board issued a decision and order, effective
4 May 19, 2008, in which Respondent's Physician's and Surgeon's Certificate Number G 21264
5 was revoked. The revocation was stayed, however, and Respondent's Physician's and Surgeon's
6 Certificate Number G 21264 was placed on probation for a period of seven (7) years with certain
7 terms and conditions. A true copy of that decision and order is attached hereto as Exhibit A and
8 incorporated by reference as if fully set forth herein.

9 **JURISDICTION**

10 4. This First Amended Accusation and Petition to Revoke Probation is brought before
11 the Board under the authority of the following laws. All section references are to the Business
12 and Professions Code (Code) unless otherwise indicated.

13 5. Section 2227 of the Code states:

14 “(a) A licensee whose matter has been heard by an administrative law judge of the
15 Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or
16 whose default has been entered, and who is found guilty, or who has entered into a
17 stipulation for disciplinary action with the board, may, in accordance with the provisions of
18 this chapter:

19 “(1) Have his or her license revoked upon order of the board.

20 “(2) Have his or her right to practice suspended for a period not to exceed one year
21 upon order of the board.

22 “(3) Be placed on probation and be required to pay the costs of probation monitoring
23 upon order of the board.

24 “(4) Be publicly reprimanded by the board. The public reprimand may include a
25 requirement that the licensee complete relevant educational courses approved by the board.

26 “(5) Have any other action taken in relation to discipline as part of an order of
27 probation, as the board or an administrative law judge may deem proper.

28 “...”

1 6. Section 2234 of the Code states:

2 “The board shall take action against any licensee who is charged with unprofessional
3 conduct. In addition to other provisions of this article, unprofessional conduct includes, but
4 is not limited to, the following:

5 “(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting
6 the violation of, or conspiring to violate any provision of this chapter.

7 “...

8 “(e) The commission of any act involving dishonesty or corruption which is
9 substantially related to the qualifications, functions, or duties of a physician and surgeon.

10 “(f) Any action or conduct which would have warranted the denial of a certificate.

11 “...”

12 7. Section 125.9 of the Code states:

13 “(a) Except with respect to persons regulated under Chapter 11 (commencing with
14 Section 7500), and Chapter 11.6 (commencing with Section 7590) of Division 3, any board,
15 bureau, or commission within the department, ... may establish, by regulation, a system for
16 the issuance to a licensee of a citation which may contain an order of abatement or an order
17 to pay an administrative fine assessed by the board, bureau, or commission where the
18 licensee is in violation of the applicable licensing act or any regulation adopted pursuant
19 thereto.

20 “(b) The system shall contain the following provisions:

21 “(1) Citations shall be in writing and shall describe with particularity the nature
22 of the violation, including specific reference to the provision of law determined to
23 have been violated.

24 “(2) Whenever appropriate, the citation shall contain an order of abatement
25 fixing a reasonable time for abatement of the violation.

26 “(3) In no event shall the administrative fine assessed by the board, bureau, or
27 commission exceed five thousand dollars (\$5,000) for each inspection or each
28 investigation made with respect to the violation, or five thousand dollars (\$5,000) for

1 each violation or count if the violation involves fraudulent billing submitted to an
2 insurance company, the Medi-Cal program, or Medicare. In assessing a fine, the
3 board, bureau, or commission shall give due consideration to the appropriateness of
4 the amount of the fine with respect to factors such as the gravity of the violation, the
5 good faith of the licensee, and the history of previous violations.

6 “(4) A citation or fine assessment issued pursuant to a citation shall inform the
7 licensee that if he or she desires a hearing to contest the finding of a violation, that
8 hearing shall be requested by written notice to the board, bureau, or commission
9 within 30 days of the date of issuance of the citation or assessment. If a hearing is not
10 requested pursuant to this section, payment of any fine shall not constitute an
11 admission of the violation charged. Hearings shall be held pursuant to Chapter 5
12 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
13 Government Code.

14 “(5) Failure of a licensee to pay a fine within 30 days of the date of assessment,
15 unless the citation is being appealed, may result in disciplinary action being taken by
16 the board, bureau, or commission. ...

17 “...”

18 8. Section 1364.10, Title 16, California Code of Regulations states:

19 “(a) For purposes of this article, ‘board official’ shall mean the chief, deputy chief or
20 supervising investigator II of the enforcement program of the board or the chief of licensing
21 of the board.

22 “(b) A board official is authorized to determine when and against whom a citation
23 will be issued and to issue citations containing orders of abatement and fines for violations
24 by a licensed physician or surgeon of the statutes referred to in Section 1364.11.

25 “(c) A citation shall be issued whenever any fine is levied or any order of abatement
26 is issued. Each citation shall be in writing and shall describe with particularity the nature
27 and facts of the violation, including a reference to the statute or regulations alleged to have

28 ////

1 been violated. The citation shall be served upon the individual personally or by certified
2 mail.”

3 9. Section 1364.11, Title 16, California Code of Regulations states:

4 “...

5 “(b) In his or her discretion, a board official may issue a citation under Section
6 1364.10 to a licensee for a violation of a term or condition contained in the decision placing
7 that licensee on probation.

8 “...

9 “(d) In his or her discretion, a board official may issue a citation with an order of
10 abatement without levying a fine for the first violation of any provision set forth above.”

11 10. Section 1364.12, Title 16, California Code of Regulations states:

12 “(a) If a cited person who has been issued an order of abatement is unable to complete
13 the correction within the time set forth in the citation because of conditions beyond his or
14 her control after the exercise of reasonable diligence, the person cited may request an
15 extension of time in which to complete the correction from the board official who issued
16 the citation. Such a request shall be in writing and shall be made within the time set forth
17 for abatement.

18 “(b) When an order of abatement is not contested or if the order is appealed and the
19 person cited does not prevail, failure to abate the violation charged within the time allowed
20 shall constitute a violation and a failure to comply with the order of abatement. An order of
21 abatement shall either be personally served or mailed by certified mail, return receipt
22 requested. The time allowed for the abatement of a violation shall begin when the order of
23 abatement is final and has been served or received. Such failure may result in disciplinary
24 action being taken by the Division of Medical Quality or other appropriate judicial relief
25 being taken against the person cited.”

26 11. Section 2002 of the Code provides, in pertinent part, that “Division of Medical
27 Quality” shall be deemed to refer to the Medical Board of California.

28 ////

1 **FIRST CAUSE TO REVOKE PROBATION**

2 **(Failure to Comply With Required Biological Fluid Testing)**

3 12. At all times after the effective date of respondent's probation in Case No. 10-2005-
4 170995, Condition No. 3 of Respondent's probation provided:

5 "BIOLOGICAL FLUID TESTING Respondent shall immediately submit to
6 biological fluid testing, at respondent's expense, upon the request of the Board or its
7 designee. A certified copy of any laboratory test results may be received in evidence in any
8 proceedings between the Board and the respondent. Failure to submit to, or failure to
9 complete the required biological fluid testing, is a violation of probation."

10 13. On or about September 27, 2010, Respondent entered into an agreement with First
11 Hospital Laboratories Inc., doing business as FirstLab.

12 14. Pursuant to Condition No. 3 of Respondent's probation and the agreement entered
13 into between Respondent and Firstlab, Respondent was required to submit to random drug and/or
14 alcohol tests administered by Firstlab. In order to ascertain whether he had been selected to be
15 tested on any particular day, Respondent was required to make daily contact with FirstLab,
16 between the hours of 12:00 a.m. and 5:00 p.m. If selected for testing, Respondent was then
17 required to report to a FirstLab approved testing site and be tested that same day.

18 15. On multiple dates in 2011 and 2012, respectively, Respondent failed to make daily
19 contact with FirstLab.

20 16. On May 3, 2012, July 30, 2012, August 3, 2012 and/or December 27, 2012,
21 Respondent was selected to be tested on that day but failed to report to a FirstLab approved
22 testing site for testing.

23 17. Respondent's probation is subject to revocation because he failed to comply with
24 Condition No. 3 of his probation in Case No. 10-2005-170995.

25 **SECOND CAUSE TO REVOKE PROBATION**

26 **(Failure to Pay Probation Monitoring Costs)**

27 18. At all times after the effective date of Respondent's probation in Case No. 10-2005-
28 170995, Condition No. 20 of Respondent's probation provided:

1 “PROBATION MONITORING COSTS Respondent shall pay the costs associated
2 with probation monitoring each and every year of probation, as designated by the Board.
3 Such costs shall be payable to the Medical Board of California and delivered to the Board
4 or its designee no later than January 31 of each calendar year. Failure to pay costs within
5 30 calendar days of the due date is a violation of probation.”

6 19. On or about October 3, 2011, Respondent was advised in writing by the Board that
7 his annual probation costs for 2011 were \$3,999.00, which amount was due and payable by no
8 later than January 31, 2012.

9 20. Respondent failed to pay the Board his probation monitoring costs for 2011 by
10 January 31, 2012.

11 21. Respondent’s probation is subject to revocation because he failed to comply with
12 Condition No. 20 of his probation in Case No. 10-2005-170995.

13 **THIRD CAUSE TO REVOKE PROBATION**

14 **(Failure to Submit Quarterly Declarations as Required)**

15 22. At all times after the effective date of respondent’s probation in Case No. 10-2005-
16 170995, Condition No. 12 of Respondent’s probation provided:

17 “QUARTERLY DECLARATIONS Respondent shall submit quarterly declarations under
18 penalty of perjury on forms provided by the Board, stating whether there has been
19 compliance with all the conditions of probation. Respondent shall submit quarterly
20 declarations not later than 10 calendar days after the end of the preceding quarter.”

21 23. Respondent’s quarterly declaration for the second quarter of 2010 was due to the
22 Board by July 10, 2010, but was received by the Board on or about July 19, 2010.

23 24. Respondent’s quarterly declaration for the third quarter of 2010 was due to the Board
24 by October 10, 2010, but was submitted on or after October 29, 2010.

25 25. Respondent’s quarterly declaration for the fourth quarter of 2010 was due to the
26 Board by January 10, 2011, but was submitted on or after February 9, 2011.

27 26. Respondent’s quarterly declaration for the second quarter of 2011 was due to the
28 Board by July 10, 2011, but was submitted on or after August 11, 2011.

1 27. Respondent's quarterly declaration for the third quarter of 2011 was due to the Board
2 by October 10, 2011, but was submitted on or after October 26, 2011.

3 28. Respondent's quarterly declaration for the fourth quarter of 2011 was due to the
4 Board by January 10, 2012, but was submitted on or after February 14, 2012.

5 29. Respondent's quarterly declaration for the first quarter of 2012 was due to the Board
6 by April 10, 2012, but was submitted on or after May 22, 2012.

7 30. Respondent's probation is subject to revocation because he failed to comply with
8 Condition No. 12 of his probation in Case No. 10-2005-170995.

9 **FIRST CAUSE FOR DISCIPLINE**

10 **(Failure To Comply With Order of Abatement)**

11 31. Respondent is subject to disciplinary action under sections 2227 and 125.9,
12 subdivision (b)(5), of the Code, and Title 16, California Code of Regulations, section 1364.12,
13 subdivision (b), in that he was cited by the Board and failed to comply with its order of
14 abatement. The circumstances are as follows:

15 32. Paragraphs 19 through 22, above, are hereby re-alleged and incorporated by reference
16 as if fully set forth herein.

17 33. On or about May 11, 2012, Respondent was issued administrative Citation Order No.
18 25-2012-222990 (the Citation Order) for his violation of Condition No. 20.

19 34. The Citation Order contained an order of abatement requiring respondent to make full
20 payment to the Board of his probation monitoring costs for the 2011 calendar year within thirty
21 days from receipt of the citation (the order of abatement). The Citation Order contained the
22 following admonition: "FAILURE TO COMPLY WITH THIS CITATION ORDER WILL
23 RESULT IN DISCIPLINARY ACTION AGAINST YOUR LICENSE." (Emphasis in original.)

24 35. The Citation Order was mailed to Respondent by certified mail, return receipt
25 requested. The return receipt was subsequently returned to the Board, signed "MICHAEL
26 BERGER" and dated May 29, 2012.

27 36. Respondent neither contested the order of abatement nor appealed the Citation Order.

28 ////

37. Respondent failed to comply with the order of abatement by failing to pay his probation monitoring costs for the 2011 calendar year within thirty days from his receipt of the order of abatement.

SECOND CAUSE FOR DISCIPLINE

(Dishonesty)

38. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (e), of the Code, in that he committed an act or acts of dishonesty or corruption, as more particularly alleged hereinafter:

39. Paragraphs 12 through 31, above, are hereby incorporated by reference and realleged as if fully set forth herein.

40. The quarterly declarations mentioned in paragraphs 12 through 31, above, and submitted by respondent pursuant to probation Condition No. 12 in Case No. 10-2005-170995, are signed under the following admonition:

“I hereby submit this Quarterly Declaration as required by the Medical Board of California and its Order of probation thereof and declare under penalty of perjury under the laws of the State of California that I have read the foregoing declaration and any attachments in their entirety and know their contents and that all statements made are true in every respect and I understand and acknowledge that any misstatements, misrepresentations, or omissions of material fact may be cause for further disciplinary action.”

41. In his quarterly declaration for the third quarter of 2012, which was signed by respondent on October 1, 2012, Question No. 3 asks:

“Are you required to undergo biological fluid testing? If yes, when were you last tested and what is the frequency of testing?”

Respondent answered “Monthly last Nov 2012.”

42. In all the quarterly declarations mentioned in paragraphs 12 through 31, and 42, above, respondent falsely declared, under penalty of perjury, that he had complied with each term and condition of probation during the preceding quarter when, in truth and fact, Respondent had

1 failed to comply with one or more terms of his probation, as described in paragraphs 12 through
2 37, and 41, above.

3 **PRAYER**

4 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
5 and that following the hearing, the Medical Board of California issue a decision:

- 6 1. Revoking probation and carrying out the discipline that was stayed in Case No. 10-
7 2005-170995 revoking Physician's and Surgeon's Certificate Number G 21264, issued to
8 Respondent MICHAEL D. BERGER, M.D.;
- 9 2. Revoking or suspending Physician's and Surgeon's Certificate Number G 21264,
10 issued to Respondent MICHAEL D. BERGER, M.D.;
- 11 3. Revoking, suspending or denying approval of Respondent MICHAEL D. BERGER,
12 M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of the Code;
- 13 4. Ordering Respondent MICHAEL D. BERGER, M.D., if placed on probation, to pay
14 the Medical Board of California the costs of probation monitoring; and
- 15 5. Taking such other and further action as deemed necessary and proper.

16
17 DATED: February 22, 2013

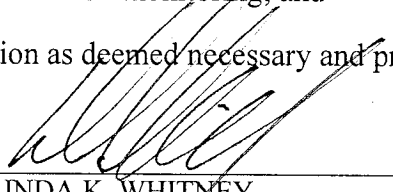

18 LINDA K. WHITNEY
19 Executive Director
20 Medical Board of California
21 Department of Consumer Affairs
22 State of California
23 Complainant

EXHIBIT A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:)

MICHAEL DEAN BERGER, M.D.)

File No. 10-2005-170995

Physician's and Surgeon's
Certificate No. G 21264)

Respondent.)

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on May 19, 2008.

IT IS SO ORDERED April 17, 2008.

MEDICAL BOARD OF CALIFORNIA

By: Cesar A. Aristeiguieta, M.D.
Cesar A. Aristeiguieta, M.D., F.A.C.E.P.
Chair
Panel A

1 EDMUND G. BROWN JR., Attorney General
of the State of California
2 STEVEN V. ADLER
Supervising Deputy Attorney General
3 RICHARD D. HENDLIN, State Bar No. 76742
Deputy Attorney General
4 110 West "A" Street, Suite 1100
San Diego, CA 92101
5
6 P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2071
7 Facsimile: (619) 645-2061

8 Attorneys for Complainant

9 **BEFORE THE**
10 **MEDICAL BOARD OF CALIFORNIA**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:

13 **MICHAEL DEAN BERGER, M.D.**
29458 Miller Road
14 Valley Center, CA 92082
Physician's and Surgeon's Certificate
15 No. G 21264

16 Respondent.

Case No. 10-2005-170995

OAH No. L-2007100675

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

17
18 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the
19 above-entitled proceedings that the following matters are true:

20 **PARTIES**

21 1. Barbara Johnston (Complainant) is the Executive Director of the Medical
22 Board of California. She brought this action solely in her official capacity and is represented in
23 this matter by Edmund G. Brown Jr., Attorney General of the State of California, by Richard D.
24 Hendlin, Deputy Attorney General.

25 2. Respondent MICHAEL DEAN BERGER, M.D. (Respondent) is
26 represented in this proceeding by attorney Patrick L. Hosey, Esq., whose address is 550 West C
27 Street, Suite 2050, San Diego, CA 92101, and whose telephone number is (619) 231-0500.

28 ///

1 3. On or about August 27, 1971, the Medical Board of California (Board)
2 issued Physician's and Surgeon's Certificate No. G 21264 to MICHAEL DEAN BERGER, M.D.
3 The Certificate was in full force and effect at all times relevant to the charges brought in
4 Accusation No. 10-2005-170995 and will expire on March 31, 2008, unless renewed.

5 **JURISDICTION**

6 4. Accusation No. 10-2005-170995 was filed before the Medical Board of
7 California, Department of Consumer Affairs, and is currently pending against Respondent. A
8 true and correct copy of the Accusation and all other statutorily required documents were
9 properly served on Respondent on September 12, 2007. Respondent timely filed his Notice of
10 Defense contesting the Accusation. A true and correct copy of Accusation No. 10-2005-170995
11 is attached as Exhibit A and incorporated herein by reference.

12 **ADVISEMENT AND WAIVERS**

13 5. Respondent has carefully read, had an opportunity to fully discuss with
14 counsel, and understands the charges and allegations in Accusation No. 10-2005-170995.
15 Respondent has also carefully read, had an opportunity to fully discuss with counsel, and
16 understands the effects of this Stipulated Settlement and Disciplinary Order.

17 6. Respondent is fully aware of his legal rights in this matter, including the
18 right to a hearing on the charges and allegations in the Accusation; the right to confront and
19 cross-examine the witnesses against him; the right to present evidence and to testify on his own
20 behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the
21 production of documents; the right to reconsideration and court review of an adverse decision;
22 and all other rights accorded by the California Administrative Procedure Act and other applicable
23 laws.

24 7. Respondent voluntarily, knowingly, and intelligently waives and gives up
25 each and every right set forth above.

26 **CULPABILITY**

27 8. Respondent admits the truth of each and every charge and allegation in
28 Accusation No. 10-2005-170995.

1 9. Respondent agrees that his Physician's and Surgeon's Certificate
2 No. G 21264 is subject to discipline and he agrees to be bound by the Board's imposition of
3 discipline as set forth in the Disciplinary Order below.

4 CONTINGENCY

5 10. This stipulation shall be subject to approval by the Medical Board of
6 California. Respondent understands and agrees that counsel for Complainant and the staff of the
7 Board may communicate directly with the Board regarding this stipulation and settlement,
8 without notice to or participation by Respondent or his counsel. By signing the stipulation,
9 Respondent understands and agrees that he may not withdraw his agreement or seek to rescind
10 the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt
11 this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall
12 be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action
13 between the parties, and the Board shall not be disqualified from further action by having
14 considered this matter.

15 11. This Stipulated Settlement and Disciplinary Order is intended by the
16 parties herein to be an integrated writing representing the complete, final and exclusive
17 embodiment of the agreements of the parties in the above-entitled matter.

18 12. The parties understand and agree that facsimile copies of this Stipulated
19 Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same
20 force and effect as the originals.

21 13. The parties understand and agree that this Stipulated Settlement and
22 Disciplinary Order is intended to resolve this case as well as pending Investigation No. 10-2007-
23 183048 (re: Business and Professions Code section 805 Report dated July 9, 2007, from the
24 California Emergency Physicians Medical Group) and pending Investigation No.
25 10-2006-178508 (re: Business and Professions Code section 801 Report re patient F.M.).

26 14. In consideration of the foregoing admissions and stipulations, the parties
27 agree that the Board may, without further notice or formal proceeding, issue and enter the
28 following Disciplinary Order:

1 **DISCIPLINARY ORDER**

2 IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. G
3 21264 issued to Respondent MICHAEL DEAN BERGER, M.D. (Respondent) is revoked.
4 However, the revocation is stayed and Respondent is placed on probation for seven (7) years on
5 the following terms and conditions.

6 1. **CONTROLLED SUBSTANCES - MAINTAIN RECORDS AND**
7 **ACCESS TO RECORDS AND INVENTORIES** Respondent shall maintain a record of all
8 controlled substances ordered, prescribed, dispensed, administered or possessed by respondent,
9 and any recommendation or approval which enables a patient or patient's primary caregiver to
10 possess or cultivate marijuana for the personal medical purposes of the patient within the
11 meaning of Health and Safety Code section 11362.5, during probation, showing all the
12 following: 1) the name and address of the patient; 2) the date; 3) the character and quantity of
13 controlled substances involved; and 4) the indications and diagnoses for which the controlled
14 substance was furnished.

15 Respondent shall keep these records in a separate file or ledger, in chronological
16 order. All records and any inventories of controlled substances shall be available for immediate
17 inspection and copying on the premises by the Board or its designee at all times during business
18 hours and shall be retained for the entire term of probation.

19 Failure to maintain all records, to provide immediate access to the inventory, or to
20 make all records available for immediate inspection and copying on the premises, is a violation
21 of probation.

22 2. **CONTROLLED SUBSTANCES - ABSTAIN FROM USE** Respondent
23 shall abstain completely from the personal use or possession of controlled substances as defined
24 in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business
25 and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does
26 not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide
27 illness or condition.

28 ///

1 Within 15 calendar days of receiving any lawful prescription medications,
2 respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and
3 telephone number; medication name and strength; and issuing pharmacy name, address, and
4 telephone number.

5 3. BIOLOGICAL FLUID TESTING Respondent shall immediately submit
6 to biological fluid testing, at respondent's expense, upon the request of the Board or its designee.
7 A certified copy of any laboratory test results may be received in evidence in any proceedings
8 between the Board and the respondent. Failure to submit to, or failure to complete the required
9 biological fluid testing, is a violation of probation.

10 4. EDUCATION COURSE Within 60 calendar days of the effective date of
11 this Decision, and on an annual basis thereafter, respondent shall submit to the Board or its
12 designee for its prior approval educational program(s) or course(s) which shall not be less than
13 40 hours per year, for each year of probation. The educational program(s) or course(s) shall be
14 aimed at correcting any areas of deficient practice or knowledge and shall be Category I certified,
15 limited to classroom, conference, or seminar settings. The educational program(s) or course(s)
16 shall be at respondent's expense and shall be in addition to the Continuing Medical Education
17 (CME) requirements for renewal of licensure. Following the completion of each course, the
18 Board or its designee may administer an examination to test respondent's knowledge of the
19 course. Respondent shall provide proof of attendance for 65 hours of continuing medical
20 education of which 40 hours were in satisfaction of this condition.

21 5. PRESCRIBING PRACTICES COURSE Within 60 calendar days of the
22 effective date of this Decision, respondent shall enroll in a course in prescribing practices, at
23 respondent's expense, approved in advance by the Board or its designee. Failure to successfully
24 complete the course during the first 6 months of probation is a violation of probation.

25 A prescribing practices course taken after the acts that gave rise to the charges in
26 the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the
27 Board or its designee, be accepted towards the fulfillment of this condition if the course would

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1 have been approved by the Board or its designee had the course been taken after the effective
2 date of this Decision.

3 Respondent shall submit a certification of successful completion to the Board or
4 its designee not later than 15 calendar days after successfully completing the course, or not later
5 than 15 calendar days after the effective date of the Decision, whichever is later.

6 6. MEDICAL RECORD KEEPING COURSE Within 60 calendar days of
7 the effective date of this decision, respondent shall enroll in a course in medical record keeping,
8 at respondent's expense, approved in advance by the Board or its designee. Failure to
9 successfully complete the course during the first 6 months of probation is a violation of
10 probation.

11 A medical record keeping course taken after the acts that gave rise to the charges
12 in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the
13 Board or its designee, be accepted towards the fulfillment of this condition if the course would
14 have been approved by the Board or its designee had the course been taken after the effective
15 date of this Decision.

16 Respondent shall submit a certification of successful completion to the Board or
17 its designee not later than 15 calendar days after successfully completing the course, or not later
18 than 15 calendar days after the effective date of the Decision, whichever is later.

19 7. CLINICAL TRAINING PROGRAM Within 60 calendar days of the
20 effective date of this Decision, respondent shall enroll in a clinical training or educational
21 program equivalent to the Physician Assessment and Clinical Education Program (PACE)
22 offered at the University of California - San Diego School of Medicine ("Program").

23 The Program shall consist of a Comprehensive Assessment program comprised of
24 a two-day assessment of respondent's physical and mental health; basic clinical and
25 communication skills common to all clinicians; and medical knowledge, skill and judgment
26 pertaining to respondent's specialty or sub-specialty, and at minimum, a 40 hour program of
27 clinical education in the area of practice in which respondent was alleged to be deficient and
28 which takes into account data obtained from the assessment, Decision(s), Accusation(s), and any

1 other information that the Board or its designee deems relevant. Respondent shall pay all
2 expenses associated with the clinical training program.

3 Based on respondent's performance and test results in the assessment and clinical
4 education, the Program will advise the Board or its designee of its recommendation(s) for the
5 scope and length of any additional educational or clinical training, treatment for any medical
6 condition, treatment for any psychological condition, or anything else affecting respondent's
7 practice of medicine. Respondent shall comply with Program recommendations.

8 At the completion of any additional educational or clinical training, respondent
9 shall submit to and pass an examination. The Program's determination whether or not
10 respondent passed the examination or successfully completed the Program shall be binding.

11 Respondent shall complete the Program not later than six months after
12 respondent's initial enrollment unless the Board or its designee agrees in writing to a later time
13 for completion.

14 Failure to participate in and complete successfully all phases of the clinical
15 training program outlined above is a violation of probation.

16 If respondent fails to complete the clinical training program within the designated
17 time period, respondent shall cease the practice of medicine within 72 hours after being notified
18 by the Board or its designee that respondent failed to complete the clinical training program.

19 Failure to participate in and complete successfully the professional enhancement
20 program outlined above is a violation of probation.

21 8. PROHIBITED PRACTICE During probation, respondent is prohibited
22 from prescribing any drugs (including, but not limited to, antibiotics, or scheduled drugs) to any
23 family members, relatives, friends, anyone living with or visiting at his residence, or anyone with
24 whom he has a business relationship, except while in the normal course of his professional
25 responsibilities as an emergency room physician while treating such individuals on an emergency
26 basis in a hospital emergency room and then only when properly documented and in accordance
27 with all of the other limitations listed in this Paragraph, below. After the effective date of this
28 Decision, Respondent shall maintain a log of all such patients treated under the exception to this

1 prohibited practice. The log shall contain the: 1) patient's name, address and phone number; 2)
2 patient's medical record number, if available; 3) the date the treatment given was; and 4) a
3 description of the drugs, amounts, and dosage given by respondent. Respondent shall keep this
4 log in a separate file or ledger, in chronological order, shall make the log available for immediate
5 inspection and copying on the premises at all times during business hours by the Board or its
6 designee, and shall retain the log for the entire term of probation. Failure to maintain a log as
7 defined in the section, or to make the log available for immediate inspection and copying on the
8 premises during business hours is a violation of probation.

9 During probation, respondent shall not:

10 a) prescribe or dispense to any patient of any single patient visit or encounter more than a
11 total of thirty (30) tablets containing any narcotic analgesic;

12 b) prescribe or dispense to any patient for any single patient visit or encounter more than
13 a total of thirty (30) tablets containing any combination of sedative/hypnotic, muscle relaxant or
14 barbiturate;

15 c) prescribe or dispense to any patient more than one (1) narcotic prescription within any
16 seven (7)-day period, including weekends and holidays; and

17 d) prescribe or dispense to any patient more than three (3) narcotic or sedative hypnotic
18 prescriptions within any ninety (90)-day period.

19 9. NOTIFICATION Prior to engaging in the practice of medicine, the
20 respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or
21 the Chief Executive Officer at every hospital where privileges or membership are extended to
22 respondent, at any other facility where respondent engages in the practice of medicine, including
23 all physician and locum tenens registries or other similar agencies, and to the Chief Executive
24 Officer at every insurance carrier which extends malpractice insurance coverage to respondent.
25 Respondent shall submit proof of compliance to the Board or its designee within 15 calendar
26 days.

27 This condition shall apply to any change(s) in hospitals, other facilities or
28 insurance carrier.

1 10. SUPERVISION OF PHYSICIAN ASSISTANTS During probation,
2 respondent is prohibited from supervising physician assistants, except that he may supervise
3 physician assistants in a hospital emergency room setting.

4 11. OBEY ALL LAWS Respondent shall obey all federal, state and local
5 laws, all rules governing the practice of medicine in California, and remain in full compliance
6 with any court ordered criminal probation, payments and other orders.

7 12. QUARTERLY DECLARATIONS Respondent shall submit quarterly
8 declarations under penalty of perjury on forms provided by the Board, stating whether there has
9 been compliance with all the conditions of probation. Respondent shall submit quarterly
10 declarations not later than 10 calendar days after the end of the preceding quarter.

11 13. PROBATION UNIT COMPLIANCE Respondent shall comply with the
12 Board's probation unit. Respondent shall, at all times, keep the Board informed of respondent's
13 business and residence addresses. Changes of such addresses shall be immediately
14 communicated in writing to the Board or its designee. Under no circumstances shall a post office
15 box serve as an address of record, except as allowed by Business and Professions Code section
16 2021(b).

17 Respondent shall not engage in the practice of medicine in respondent's place of
18 residence. Respondent shall maintain a current and renewed California physician's and
19 surgeon's license.

20 Respondent shall immediately inform the Board, or its designee, in writing, of
21 travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last,
22 more than 30 calendar days.

23 14. INTERVIEW WITH THE BOARD, OR ITS DESIGNEE Respondent
24 shall be available in person for interviews either at respondent's place of business or at the
25 probation unit office, with the Board or its designee, upon request at various intervals, and either
26 with or without prior notice throughout the term of probation.

27 15. RESIDING OR PRACTICING OUT-OF-STATE In the event respondent
28 should leave the State of California to reside or to practice, respondent shall notify the Board or

1 its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice
2 is defined as any period of time exceeding 30 calendar days in which respondent is not engaging
3 in any activities defined in Sections 2051 and 2052 of the Business and Professions Code.

4 All time spent in an intensive training program outside the State of California
5 which has been approved by the Board or its designee shall be considered as time spent in the
6 practice of medicine within the State. A Board-ordered suspension of practice shall not be
7 considered as a period of non-practice. Periods of temporary or permanent residence or practice
8 outside California will not apply to the reduction of the probationary term. Periods of temporary
9 or permanent residence or practice outside California will relieve respondent of the responsibility
10 to comply with the probationary terms and conditions with the exception of this condition and
11 the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance;
12 and Cost Recovery.

13 Respondent's license shall be automatically cancelled if respondent's periods of
14 temporary or permanent residence or practice outside California total two years. However,
15 respondent's license shall not be cancelled as long as respondent is residing and practicing
16 medicine in another state of the United States and is on active probation with the medical
17 licensing authority of that state, in which case the two year period shall begin on the date
18 probation is completed or terminated in that state.

19 16. FAILURE TO PRACTICE MEDICINE - CALIFORNIA RESIDENT

20 In the event respondent resides in the State of California and for any reason
21 respondent stops practicing medicine in California, respondent shall notify the Board or its
22 designee in writing within 30 calendar days prior to the dates of non-practice and return to
23 practice. Any period of non-practice within California, as defined in this condition, will not
24 apply to the reduction of the probationary term and does not relieve respondent of the
25 responsibility to comply with the terms and conditions of probation. Non-practice is defined as
26 any period of time exceeding 30 calendar days in which respondent is not engaging in any
27 activities defined in sections 2051 and 2052 of the Business and Professions Code.

28 ///

1 All time spent in an intensive training program which has been approved by the
2 Board or its designee shall be considered time spent in the practice of medicine. For purposes of
3 this condition, non-practice due to a Board-ordered suspension or in compliance with any other
4 condition of probation, shall not be considered a period of non-practice.

5 Respondent's license shall be automatically cancelled if respondent resides in
6 California and for a total of two years, fails to engage in California in any of the activities
7 described in Business and Professions Code sections 2051 and 2052.

8 17. COMPLETION OF PROBATION Respondent shall comply with all
9 financial obligations (e.g., probation costs) not later than 120 calendar days prior to the
10 completion of probation. Upon successful completion of probation, respondent's certificate shall
11 be fully restored.

12 18. VIOLATION OF PROBATION Failure to fully comply with any term or
13 condition of probation is a violation of probation. If respondent violates probation in any respect,
14 the Board, after giving respondent notice and the opportunity to be heard, may revoke probation
15 and carry out the disciplinary order that was stayed. If an Accusation, Petition to Revoke
16 Probation, or an Interim Suspension Order is filed against respondent during probation, the Board
17 shall have continuing jurisdiction until the matter is final, and the period of probation shall be
18 extended until the matter is final.

19 19. LICENSE SURRENDER Following the effective date of this Decision, if
20 respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy
21 the terms and conditions of probation, respondent may request the voluntary surrender of
22 respondent's license. The Board reserves the right to evaluate respondent's request and to
23 exercise its discretion whether or not to grant the request, or to take any other action deemed
24 appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender,
25 respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the
26 Board or its designee and respondent shall no longer practice medicine. Respondent will no
27 longer be subject to the terms and conditions of probation and the surrender of respondent's
28 license shall be deemed disciplinary action. If respondent re-applies for a medical license, the

1 application shall be treated as a petition for reinstatement of a revoked certificate.

2 20. PROBATION MONITORING COSTS Respondent shall pay the costs
3 associated with probation monitoring each and every year of probation, as designated by the
4 Board. Such costs shall be payable to the Medical Board of California and delivered to the Board
5 or its designee no later than January 31 of each calendar year. Failure to pay costs within 30
6 calendar days of the due date is a violation of probation.

7 ACCEPTANCE

8 I have carefully read the above Stipulated Settlement and Disciplinary Order and
9 have had an opportunity to fully discuss it with my attorney, Patrick L. Hosey, Esq. I understand
10 the stipulation and the effect it will have on my Physician's and Surgeon's Certificate No. G
11 21264. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and
12 intelligently, and agree to be bound by the Decision and Order of the Medical Board of
13 California.

14 DATED: _____.

15
16 _____
17 MICHAEL DEAN BERGER, M.D.
18 Respondent

19 I have read and had an opportunity to fully discuss with Respondent
20 MICHAEL DEAN BERGER, M.D., the terms and conditions and other matters contained in the
21 above Stipulated Settlement and Disciplinary Order. I approve its form and content.

22 DATED: _____.

23
24 _____
25 PATRICK L. HOSEY, Esq.
26 Attorney for Respondent

27 ///

28 ///

///

1 application shall be treated as a petition for reinstatement of a revoked certificate.

2 20. PROBATION MONITORING COSTS Respondent shall pay the costs
3 associated with probation monitoring each and every year of probation, as designated by the
4 Board. Such costs shall be payable to the Medical Board of California and delivered to the Board
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11 21264. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and
12 intelligently, and agree to be bound by the Decision and Order of the Medical Board of
13 California.

14 DATED: 1-24-08

15
16 
17 MICHAEL DEAN BERGER, M.D.
Respondent

18 I have read and had an opportunity to fully discuss with Respondent
19 MICHAEL DEAN BERGER, M.D., the terms and conditions and other matters contained in the
20 above Stipulated Settlement and Disciplinary Order. I approve its form and content.

21 DATED: 1/24/08

22
23 
24 PATRICK L. HOSEY, Esq.
25 Attorney for Respondent

26 ///

27 ///

28 ///

1 ENDORSEMENT

2 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully
3 submitted for consideration by the Medical Board of California of the Department of Consumer
4 Affairs.

5
6 DATED: JAN. 24th, 2008

7 EDMUND G. BROWN JR., Attorney General
8 of the State of California

9 STEVEN V. ADLER
10 Supervising Deputy Attorney General

11 Richard D. Hendlin
12 RICHARD D. HENDLIN
13 Deputy Attorney General
14 Attorneys for Complainant

15 DOJ Matter ID: SD2007801936
16 80196383 rev.wpd
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Exhibit A

Accusation No. 10-2005-170995

1 EDMUND G. BROWN JR., Attorney General
of the State of California
2 STEVEN V. ADLER
Supervising Deputy Attorney General
3 RICHARD D. HENDLIN, State Bar No. 76742
Deputy Attorney General
4 California Department of Justice
110 West "A" Street, Suite 1100
5 San Diego, CA 92101

6 P.O. Box 85266
San Diego, CA 92186-5266
7 Telephone: (619) 645-2071
Facsimile: (619) 645-2061

8 Attorneys for Complainant
9

10 **BEFORE THE**
11 **DIVISION OF MEDICAL QUALITY**
12 **MEDICAL BOARD OF CALIFORNIA**
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

13 In the Matter of the Accusation Against:

14 **MICHAEL DEAN BERGER, M.D.**
29458 Miller Road
15 Valley Center, CA 92082

16 Physician's and Surgeon's Certificate
No. G 21264

17 Respondent.
18

Case No. 10-2005-170995

OAH No.

A C C U S A T I O N

19 Complainant alleges:

20 **PARTIES**

21 1. Barbara Johnston (Complainant) brings this Accusation solely in her
22 official capacity as the Executive Director of the Medical Board of California, Department of
23 Consumer Affairs.

24 2. On or about August 27, 1971, the Medical Board of California issued
25 Physician's and Surgeon's Certificate Number G 21264 to MICHAEL DEAN BERGER, M.D.
26 (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times
27 relevant to the charges brought herein and will expire on March 31, 2008, unless renewed.

28 ///

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO September 12, 20 07
BY Valerie Moa ANALYST

1 5. Section 2227 of the Code states:

2 "(a) A licensee whose matter has been heard by an administrative law judge of
3 the Medical Quality Hearing Panel as designated in Section 11371 of the Government
4 Code, or whose default has been entered, and who is found guilty, or who has entered into
5 a stipulation for disciplinary action with the division, may, in accordance with the
6 provisions of this chapter:

7 "(1) Have his or her license revoked upon order of the division.

8 "(2) Have his or her right to practice suspended for a period not to exceed
9 one year upon order of the division.

10 "(3) Be placed on probation and be required to pay the costs of probation
11 monitoring upon order of the division.

12 "(4) Be publicly reprimanded by the division.

13 "(5) Have any other action taken in relation to discipline as part of an order
14 of probation, as the division or an administrative law judge may deem proper.

15 "(b) Any matter heard pursuant to subdivision (a), except for warning
16 letters, medical review or advisory conferences, professional competency
17 examinations, continuing education activities, and cost reimbursement associated
18 therewith that are agreed to with the division and successfully completed by the
19 licensee, or other matters made confidential or privileged by existing law, is
20 deemed public, and shall be made available to the public by the board pursuant to
21 Section 803.1."

22 6. Section 2234 of the Code states:

23 "The Division of Medical Quality shall take action against any licensee who
24 is charged with unprofessional conduct. In addition to other provisions of this
25 article, unprofessional conduct includes, but is not limited to, the following:

26 "(a) Violating or attempting to violate, directly or indirectly, assisting in or
27 abetting the violation of, or conspiring to violate any provision of this chapter
28 [Chapter 5, the Medical Practice Act].

1 "(b) Gross negligence.

2 "(c) Repeated negligent acts. To be repeated, there must be two or more
3 negligent acts or omissions. An initial negligent act or omission followed by a
4 separate and distinct departure from the applicable standard of care shall constitute
5 repeated negligent acts.

6 "(1) An initial negligent diagnosis followed by an act or omission
7 medically appropriate for that negligent diagnosis of the patient shall constitute a
8 single negligent act.

9 "(2) When the standard of care requires a change in the diagnosis, act, or
10 omission that constitutes the negligent act described in paragraph (1), including,
11 but not limited to, a reevaluation of the diagnosis or a change in treatment, and the
12 licensee's conduct departs from the applicable standard of care, each departure
13 constitutes a separate and distinct breach of the standard of care.

14 "(d) Incompetence.

15 "(e) The commission of any act involving dishonesty or corruption which
16 is substantially related to the qualifications, functions, or duties of a physician and
17 surgeon.

18 "(f) Any action or conduct which would have warranted the denial of a
19 certificate.

20 "(g)"

21 7. Section 2266 of the Code states: "The failure of a physician and
22 surgeon to maintain adequate and accurate records relating to the provision of services to
23 their patients constitutes unprofessional conduct."

24 **FIRST CAUSE FOR DISCIPLINE**

25 (Repeated Negligent Acts)

26 8. Respondent is subject to disciplinary action under Code sections
27 2220, 2227 and 2234 as defined by Code section 2234 subdivision (c), in that he engaged

28 ///

1 in repeated negligent acts in his care, treatment and management of patient B.P. The
2 circumstances are as follows:

3 9. On or about February 28, 2003, at approximately 6:55 p.m., patient
4 B.P., a 66-year-old female presented to the Emergency Department at Pioneer's Memorial
5 Hospital located at 207 West Legion Road, in Brawley, California, with complaints of
6 constant "cramping" like pain originating in her right leg hamstring area and radiating
7 down to her calf. She also reported her right foot proximal to the mid-shin felt numb. She
8 was noted to have "SOB" (shortness of breath) and a pulse oximetry of 87%. Patient B.P.
9 had a past medical history of hypertension, chronic obstructive pulmonary disease (COPD)
10 and phlebitis (inflammation of a vein) for which she wore compression stockings. She
11 reported that the pain she was experiencing was different than usual. She had no palpable
12 pulse to her right foot, and weak right popliteal (behind the knee) pulse on the right side.
13 She reported feeling only minimal relief after receiving pain medications. Initially, she
14 was evaluated by a physician assistant, B.R., P.A., and then she was referred to respondent
15 who is an emergency medicine physician. The physician assistant's impression/diagnosis
16 was: 1) arterial insufficiency and 2) claudication¹

17 10. After respondent evaluated patient B.P., he consulted with the
18 general surgeon on call who advised respondent that he could safely discharge patient B.P.
19 home without further diagnostic work-up for her leg.

20 11. Respondent did not determine either by consulting with patient
21 B.P.'s own personal physician or otherwise what her leg's baseline vascular disease status
22 was nor did respondent determine her baseline respiratory status. Respondent did not
23 order or perform any diagnostic tests, nor did he transfer patient B.P. to another facility
24 where diagnostic tests could be performed. Respondent felt there was no emergency
25 medical condition and discharged patient B.P. home at 8:56 p.m., with instructions to rest,
26

27 1. "Claudication" means limping, usually referring to intermittent. (Stedman's Medical
28 Dict. (27th ed., 2000) p. 360.)

1 drink plenty of fluids, take Vicodin for pain, Trental every 8 hours, and aspirin and Plavix
2 every day, and to see a Dr. B. in 5 days, and return to the Emergency Department if her
3 condition got worse.

4 12. Two days later on or about March 2, 2003, at 12:39 p.m., patient
5 B.P. returned to the Emergency Room with a pale, cold, painful right leg. She had an
6 abnormal EKG and elevated troponin levels. She was diagnosed as having arterial
7 occlusion of the right leg. She was discharged at 4:35 p.m. from Pioneer's Memorial
8 Hospital and flown to UCSD Hospital for a higher level of care, arriving at UCSD
9 Hospital approximately 6:00 p.m. on March 2, 2003, where she was diagnosed with an
10 ischemic foot. On March 3, 2003, patient B.P. underwent a right-lower-extremity
11 fasciotomy (excision of strips of fascia) and an above-the-knee amputation of her right leg.

12 13. Respondent engaged in repeated negligent acts in his care, treatment
13 and management of patient B.P. by reason of, but not limited to, the following:

14 A. The allegations set forth in paragraphs 8 through 12 above are
15 incorporated herein by reference as though fully set forth.

16 B. On February 28, 2003, respondent failed to determine whether
17 patient B.P.'s signs of arterial insufficiency were her baseline by, for
18 example, reviewing her prior medical records or speaking with her primary
19 care physician.

20 C. On February 28, 2003, respondent failed to obtain an immediate
21 diagnostic evaluation such as a Doppler ultrasound and/or an arteriogram of
22 patient B.P.'s signs and symptoms of arterial insufficiency. Alternatively,
23 if the means to perform such an appropriate diagnostic evaluation were
24 unavailable to respondent at Pioneer's Memorial Hospital Emergency
25 Department, respondent failed to transfer the patient to another facility
26 where an appropriate diagnostic evaluation could be performed.

27 D. On February 28, 2003, respondent failed to determine whether
28 patient B.P.'s abnormal signs of shortness of breath, tachycardia and low

Oxygen (O2) saturation, were her baseline by, for example, reviewing her prior medical records or speaking with her primary care physician.

E. On February 28, 2003, respondent, not knowing patient B.P.'s baseline for her abnormal vital signs, failed to get additional tests including, but not limited to, a chest x-ray, blood gasses, an EKG, testing for cardiac enzymes, and a complete blood count (CBC) with differential, and failed to communicate with patient's B.P.'s primary care physician.

SECOND CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Records)

14. Respondent is subject to disciplinary action under Code sections 2220, 2227 and 2234 as defined by Code section 2266, in that he failed to maintain adequate and accurate medical records in connection with his care, treatment and management of patient B.P. The circumstances are as follows:

15. The allegations set forth in paragraphs 8 through 13 above are incorporated herein by reference as though fully set forth.

16. Respondent failed to write an addendum to the medical chart clearly stating that the patient did not have "claudication" as the Physician Assistant had thought and documented.

17. Respondent failed to document a purported discussion he had with the on-call general surgeon.

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1 PRAYER

2 WHEREFORE, Complainant requests that a hearing be held on the matters
3 herein alleged, and that following the hearing, the Division of Medical Quality issue a
4 decision:

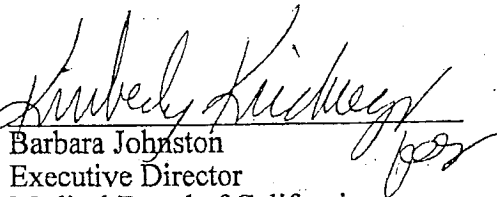
5 1. Revoking or suspending Physician's and Surgeon's Certificate
6 Number G 21264, issued to MICHAEL DEAN BERGER, M.D.;

7 2. Revoking, suspending or denying approval of MICHAEL DEAN
8 BERGER, M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of
9 the Code;

10 3. Ordering MICHAEL DEAN BERGER, M.D., if placed on
11 probation, to pay the Division of Medical Quality the costs of probation monitoring; and,

12 4. Taking such other and further action as deemed necessary and
13 proper.

14
15 DATED: September 12, 2007

16
17 
18 Barbara Johnston
19 Executive Director
20 Medical Board of California
21 Department of Consumer Affairs
22 State of California
23 Complainant